IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

ANA C.-M.,

Plaintiff,

٧.

Civil Action No. 3:20-CV-0296 (DEP)

KILOLO KIJAKAZI, Acting Commissioner of Social Security,¹

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

LACKMAN GORTON LAW FIRM P.O. Box 89 1500 East Main St. Endicott, NY 13761-0089 PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN. 625 JFK Building 15 New Sudbury St Boston, MA 02203 MOLLY CARTER, ESQ.

Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES U.S. MAGISTRATE JUDGE

<u>ORDER</u>

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(3)(c), are cross-motions for judgment on the pleadings.² Oral argument was heard in connection with those motions on July 14, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is

This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

incorporated herein by reference, it is hereby

ORDERED, as follows:

- Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles U.S. Magistrate Judge

Dated: July 23, 2021

Syracuse, NY

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

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ANA C.-M.,

Plaintiff,

VS.

3:20-CV-296

KILOLO KIJAKAZI, COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Transcript of a **Decision** held during a

Digitally-Recorded Telephone Conference on July 14,

2021, the HONORABLE DAVID E. PEEBLES, United States

Magistrate Judge, Presiding.

APPEARANCES

(By Telephone)

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(The Court and all counsel present by telephone, 2:16 p.m.)

THE COURT: All right. Let me begin by thanking both of you for excellent presentations, you presented me with quite an interesting complex case with a wealth of medical and expert opinion evidence contained in the administrative transcript.

I have before me a challenge to the Commissioner's determination finding that plaintiff was not disabled at the relevant times and therefore ineligible for the benefits which she sought. The challenge is brought pursuant to 42 United States Code Section 405(g) and 1383(c)(3).

The background is as follows: Plaintiff was born in June of 1966 and is currently 55 years of age. She stands 5 foot 4 inches in height and has at various times weighed between 166 and 199 pounds. Plaintiff is divorced. She has children who live in Puerto Rico with their father. plaintiff moved from Puerto Rico approximately three years ago and has lived in New Jersey and more recently in Binghamton or the Binghamton area in various apartment settings. At points she was living alone, at other times she was living with a granddaughter. Plaintiff has a GED and while in school in Puerto Rico attended regular classes. She also has a certification in the area of phlebotomy. Plaintiff is right-handed. She has, is equivocal as to

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whether she has a driver's license, at one point it was suspended. Plaintiff stopped working sometime in 2011. Her past positions have included as a retail clerk, a private security guard, a child care assistant, a bus aide, a laborer, an airline or airplane cleaner, and self-employed as a hair stylist. Beginning in October of 2019, plaintiff began being paid approximately 18 to 39 hours per week to care for her mother and that position included various other tasks including cleaning house.

Physically, plaintiff suffers from degenerative disk disease of the lumbar spine, a right knee meniscal tear, status post surgery repair which occurred in December of 2016, asthma, a bilateral foot disorder, described as plantar fascial fibromatosis, an obstructive sleep apnea condition, headaches, and peripheral neuropathy of the lower extremities, and diabetes. She has also had a cochlear hearing transplant surgery on her left ear in June of 2009 and her right ear in June of 2010. She's had multiple foot surgeries, the latest of which was 2017, she underwent a laminectal discectomy of the L3-L4 region in September of 2015, as I indicated, right knee surgery in December of 2016. She reports having been struck as a pedestrian by a car in 2003, leading to some of the physical conditions. She was also attacked by dogs at one point.

Mentally plaintiff suffers from depression, bipolar

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disorder, anxiety, post-traumatic stress disorder, and major depressive disorder. One of the causes for her mental health condition was the murder of her son in June of 2012. She has undergone no psychiatric hospitalization. There is some evidence that at some point she underwent counseling approximately one time per month.

Plaintiff has seen multiple doctors over time. Her general practitioner was a nurse practitioner, Scott Rosman. She has also seen orthopedic surgeon Dr. Eric Seybold. She has seen Dr. Anne Calkins for her back and pain management, Dr. Zia Shah, a pulmonologist, Dr. Brandy Benjamin, Dr. Robert Webster, a psychiatrist, Dr. James Hogan, a podiatrist, Dr. Ahmed Shoaib, described as a primary physician, Dr. James Vincens, Licensed Clinical Social Worker Kyle Webb, Nurse Practitioner Amy Cron, and Dr. Khaula Rehman, a psychiatrist she saw on two occasions.

In terms of activities of daily living, plaintiff is able to bathe, dress, cook, clean, shop, do laundry, care for her granddaughter and her mother, attend school. She apparently tried to take a medical assistant's course at Elmira Business Institute but left school reportedly to care for her mother. She is able to use a computer, travel, shop, walk, socialize with friends, attend medical appointments, watch television, she does not like to take public transportation but does on occasion. The evidence is

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equivocal as to whether she smokes. She reportedly quit but may be using E-cigarettes. At one point she was smoking three packs of cigarettes per day. She is also a past user of heroin and crack cocaine.

This case has a relatively tortured procedural history. Plaintiff previously filed six applications for benefits, the most recent prior to this application was denied in March of 2012. On February 28, 2013, she filed an application for Title II and Title XVI benefits, alleging an onset date of May 1, 2011. There were subsequent applications on August 28, 2015 and December 6, 2017. Those applications, the three of them were consolidated for consideration at some point in this case.

There have been eight administrative hearings conducted to address plaintiff's various claims in the record. Several relate to the prior application, including June 21, 2007, November 5, 2007, October 9, 2009.

December 23, 2012 was a hearing addressing the current applications before Richard DeStefano. There was a hearing on October 2, 2014 before Barry Ryan, July 30th, 2015 before ALJ Barry Ryan, and October 11, 2017 hearing before Judge Elizabeth Koennecke, and another before that same ALJ on November 26, 2019. There were three administrative law judge decisions addressing the current applications, the first from Barry Ryan in August of 2015. That resulted in a consent

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remand when action was commenced in a District Court. The remand occurred on February 1, 2017 and it resulted in a decision from the Social Security Administration Appeals Council on May 7, 2019, vacating the earlier decision and remanding. A second ALJ decision was issued on November 3, 2017 by Administrative Law Judge Elizabeth Koennecke. That ultimately resulted in a reversal by United States Magistrate Judge Thérèse Wiley Dancks on March 11, 2019. ALJ Koennecke issued a third decision on January 7, 2020, which became a final determination of the agency, after 60 days. This case was commenced on March 16, 2020, and is timely.

In her decision, ALJ Koennecke painstakingly recounts the medical evidence in the case and the reasons for her decision. She also addresses earlier decisions and is somewhat exercised over having been reversed apparently, but I will say before I address her opinion, I do agree with Mr. Gorton that quantity does not equal quality, but in this case the decision is comprehensive and, as you will see, I think supported.

The administrative law judge in her decision indicated first that plaintiff was last insured on December 31, 2012.

At step one, she found that plaintiff had not engaged in substantial gainful activity since May 1, 2011, the alleged onset date. She did acknowledge that plaintiff

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was hired to care for her mother and paid and while she did not consider that substantial gainful activity, she did take it into account when addressing the residual functional capacity of the plaintiff.

At step two, ALJ Koennecke found that plaintiff suffers from severe impairments that impose more than minimal limitations on her ability to perform work-related functions, basic work-related functions including a mental impairment that was variously characterized over time, asthma or emphysema, obstructive sleep apnea, degenerative disk disease of the lumbar spine, small meniscal tear of the right knee status postsurgical repair of right knee, and a bilateral foot disorder.

At step three, she concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the regulations and she considered quite a few listings addressing both the mental and the physical limitations and conditions experienced by the plaintiff.

ALJ Koennecke next concluded that notwithstanding her impairments, plaintiff is capable of performing sedentary work with exceptions related primarily but not exclusively to, I should say primarily but not exclusively to her mental condition because one could argue that the regularly attend to a routine and maintain a schedule has physical and mental

components to it.

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Applying that RFC finding with the assistance of testimony from a vocational expert, ALJ Koennecke concluded that plaintiff is capable of performing her past relevant work as a hair braider and therefore concluded, without addressing step five, that plaintiff was not disabled at the relevant times.

As you know, the court's function in this case is extremely limited. I must determine whether correct legal principles were applied and the resulting determination is supported by substantial evidence. Substantial evidence being defined as such relevant evidence as a reasonable mind would find sufficient to support a conclusion. The Second Circuit has noted in Brault v. Social Security Administration Commissioner, 683 F.3d 443 from June of 2012 that this is an extremely deferential and stringent standard. In Brault, the court also noted that under the substantial evidence standard, once an ALJ finds a fact, that fact can be rejected only if a reasonable fact finder would have to conclude otherwise.

Plaintiff raises essentially four arguments in support of her challenge to the determination. She argues that it was error not to credit Dr. Hogan's opinions as an acceptable medical source and a treating source.

Secondly, she argues that the ALJ substituted her

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judgment for medical opinions and wrapped into that is a failure to include a sit/stand option into the residual functional capacity finding.

The third relates to the failure to properly analyze plaintiff's mental limitations and focus on semi-skilled work in the face of Dr. Loomis' opinion of April 4, 2013 at page 704 to the effect that plaintiff suffers from marked impairments in maintaining attendance and concentration.

And fourth, she argues that she is not able to perform her past relevant work because of her deficits in concentration, work pace and attendance.

I will note that notwithstanding Judge Dancks' order to the contrary, I did read and consider plaintiff's reply brief in addressing this case.

The first argument relates to opinions of Dr. Hogan who has issued several reports suggesting that over time plaintiff's foot conditions have worsened, citing 3022, 3023, 3024, and 2939 of the administrative record. Dr. Hogan has given various opinions concerning plaintiff's ability to walk and stand and the need to elevate feet. In March of 2015, he opined that plaintiff can stand only two out of eight hours and must elevate her feet 25 percent of the time. At another point, he opined that plaintiff can only walk or stand for five minutes out of each hour. Dr. — as the Commissioner

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concedes, Dr. Hogan as a podiatrist does qualify as an acceptable medical source under the regulations which were in effect at the time of plaintiff's application. And so, as a treating physician, his opinions regarding the nature and severity of plaintiff's impairment normally would be entitled to considerable deference, if supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with other substantial evidence. His opinions, however, are not necessarily controlling if they are contrary to other substantial evidence in the record, including opinions of other medical experts. And of course, under such cases as *Veino v. Barnhart*, 312 F.3d 578, Second Circuit 2002, it is for the administrative law judge to resolve any conflicts in the medical evidence.

In this case, Dr. Hogan's opinions were discussed by Administrative Law Judge Koennecke at 1931 of the administrative transcript and they were given little weight. And ALJ Koennecke explained why. Despite Dr. Hogan stating that plaintiff's condition worsened, at the hearing plaintiff claims that her condition remained the same. She also explained that the opinions are inconsistent with plaintiff's activities of daily living, including her ability to attend school and care for her mother. She discussed inconsistent, the fact that the opinions were inconsistent with findings at page 1932, and erroneously, as we said, at page 1935 treated

Dr. Hogan as not an acceptable medical source.

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I have reviewed the treatment of Dr. Hogan's opinions in the context of and considering him as a treating source, and although there was not the rote discussion of the Burgess factors, which include length of treatment relationship and frequency of examination, nature and extent of the treatment relationship, the degree to which the medical source has supported his or her opinion, the degree of consistency between the opinion and the record as a whole, whether the opinion is given by a specialist, and other evidence as set forth in both Burgess and 20 C.F.R. Section 404.1527 and 416.927, I do find that several of those have been -- were specifically addressed, and relying on Estrella v. Berryhill, 925 F.3d 90, Second Circuit 2019, I find that a searching review of the record fails to disclose any violation of the treating source rule when it comes to Dr. Hogan's opinion. To the extent that she was in error in treating him as a treating source, I find the error is harmless, and there would be no useful purpose served in remanding for consideration of Dr. Hogan's opinions and treatment as a treating source. Lugo v. Commissioner of Social Security, 2017 WL 4005621 from the Northern District of New York, September 11, 2017. So I find no error in response to point number one.

In terms of the analysis of medical opinions,

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there's a wealth of information in this record. I didn't count them up but we have medical source statements from multiple individuals addressing both the physical and mental impairments of the plaintiff. Dr. A. Periakaruppan issued opinions on March 1, 2018, that's at 2034 to 2036, and March 5, 2018, 2850 to 2851, discussed and given some weight by the administrative law judge at 1929 to 1930 and again at 1935.

Dr. Gilbert Jenouri, an examining consultant, issued reports on April 4, 2013, 706 to 710, November 17, 2016, 3098 to 3101, and February 14, 2018, 2843 to 2846, given some weight by the administrative law judge. She discussed those opinions at 1930 and 1935.

Dr. Hogan, we've addressed, issued many opinions. They were discussed by the administrative law judge at 1931, 1932 and given little weight.

Dr. Eric Seybold issued opinions at -- on June 16, 2016, that's at 824 to 825, discussed and given little weight at 1932, 1935, 1940, and 1942.

Dr. Ahmed Shoaib issued an opinion on September 4, 2014 at pages 759 to 760, discussed and given little weight at 1914, 1931 to 1932, 1935, 1940, and 1942.

Dr. Anne Calkins issued a report, or opinions on October 11, 2017, October 18, 2019, May 11, 2019 at 3067 to 3071 and 2432, given little weight and discussed at 1931,

1935, 1940, and 1942.

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Dr. Echevarria issued an opinion on June 6, 2013 finding no evidence of a disorder. 174 to 180. On the mental side of things — and Dr. Echevarria actually addressed the mental as well.

Dr. M. Juriga, psychologist, issued an opinion, a nonexamining psychologist, February 22, 2018, at 2036, 2039, given some weight 1937.

Dr. Khaula Rehman issued an opinion on May 15, 2019, I noted that she only saw the plaintiff twice. That was reported at 2944 to 2945. It was given some weight but not great weight, discussed at 1939 to 1942.

Dr. Mary Ann Moore issued an opinion, a consultative examiner, on February 14, 2018 at 2835 to 2840, given some weight but not great weight, 1938.

Dr. T. Harding, state agency consultant, at 2055 to 2068, given some weight, discussed at 1937.

LCSW Kyle Webb, July 8, 2015, it was found at 952 to 953. Nurse Practitioner Amy Cron and LCSW Webb issued an opinion on March 2, 2015, 836 to 838, given little weight, 1940, 1942.

Dr. Robert Webster, September 3, 2014, 757 to 758, given little weight, 1940, 1942.

Dr. Cheryl Loomis, consultative examiner, April 4, 2013, 702 to 705, given great weight and discussed at 1936.

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Dr. Echevarria, June 6, 2013, 160 to 171, and again 174 to 186, given some weight, 1937.

And lastly, Dr. Amanda Slowik, another examining psychologist I believe, that was from November 17, 2016, it appears at 3105 to 3110, given some weight but not great weight, 1938.

The focus of the attack on the weight of the evidence is on both the off-task and absence portion based on Dr. Shoaib, Dr. Seybold, and Dr. Calkins, and the requirement of elevating feet, Dr. Hogan. That's the physical.

On the mental side, plaintiff points to marked impairment to attention and concentration from Dr. Slowik, moderate limitation in concentration and pace, Dr. Moore, and off-task and absences from Dr. Slowik, Dr. Loomis, Dr. Webster, Nurse Practitioner Cron, and LCSW Webb, Dr. Moore, and Dr. Juriga.

It is for the administrative law judge, as pivotal of course to the determination, to affix the plaintiff's residual functional capacity, or RFC, which is defined as a range of tasks she is capable of performing notwithstanding her impairments. Ordinarily an RFC represents a claimant's maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day, for five days a week or an equivalent schedule. And of course an RFC determination is informed by

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consideration of all of the relevant medical and other evidence and must be, like anything else, supported by substantial evidence to withstand scrutiny.

On the physical side, the RFC determination, clearly there's conflicting evidence. There's something in those medical opinions for everyone. The physical side is supported by Dr. Jenouri and Dr. Periakaruppan which were relied on by the administrative law judge. It's well established that consultative opinions can override a treating source's opinion. James C. v. Commissioner of Social Security, 2020 WL 6445907, Northern District of New York, November 3, 2020.

On the mental side, the RFC says semi-skilled work but the vocational expert clearly considered the position as both generally performed and as the plaintiff performed it and concluded that plaintiff is capable of performing it if limited to simple instructions and tasks. That occurs at 1063 to 1064, and that finding or that — the plaintiff's ability in that regard is supported by the opinions of Dr. Echevarria, plaintiff's activities of daily living, the the opinion of Dr. Loomis, the opinion of Dr. T. Harding, Dr. Moore, and Dr. Juriga.

The plaintiff is asking this court to reweigh the medical evidence which of course, under *Veino*, would be improper.

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Focusing specifically on off-task and absenteeism, Drs. Echevarria, Harding, Juriga, and Periakaruppan are state agency consultants that found that, notwithstanding plaintiff's physical and mental limitations, she is able to perform work. I know that the POMS, the argument that the Commissioner raises is that under the POMS, those consultants were charged with determining whether plaintiff can perform on a sustained basis and adhere to a schedule, and although the POMS are not binding on the court, they are, they provide context because I think from those opinions you can infer that those state agency consultants concluded plaintiff is able to perform on a sustained basis and meet a schedule. The administrative law judge also relied to some degree on Dr. Rehman's opinions, that's found at 1939. Under Veino, it's for the ALJ to resolve conflicts. There clearly is conflict in the record. The ALJ did not rely solely on her lay opinion to reject medical opinions. She explains specifically in fairly significant detail why neither the mental nor physical impairments precluded plaintiff's ability to maintain a schedule. Substantial evidence supports that determination, and I note, by the way, that it is perfectly proper for an administrative law judge to scrutinize whether medical evidence supports an opinion, 20 C.F.R. Sections 404.1527(c)(2) and (3) and 416.927(c)(2) and (3).

In terms of the sit/stand option, Dr. Jenouri three

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times and Dr. Periakaruppan's opinion support the lack of need for — to alter positions. Dr. Jenouri found that plaintiff was moderately limited in standing, sitting, walking, sitting. Dr. Periakaruppan indicated that plaintiff could sit, stand, and walk six hours with normal breaks. Those limitations are not inconsistent with sedentary work with normal breaks. Raymond C. v. Commissioner of Social Security, 2020 WL 42814, Northern District of New York, January 3, 2020. And in his opinion in that case, Chief Judge Glenn T. Suddaby cites other cases that support that proposition.

The administrative law judge explained why she afforded little weight to the contrary opinions by Dr. Seybold and Dr. Calkins, including based on exam findings and activities of daily living. I find that it is adequately explained and the rejection of the sit/stand option is supported by substantial evidence.

The fourth argument is a step four challenge and it's dependent on the challenge to the residual functional capacity and I find that, having rejected those arguments, that substantial evidence supports and in particular the vocational expert's testimony supports plaintiff's ability to perform her past relevant work as a hair braider. It's discussed by Administrative Law Judge Koennecke at 1972 to 1974, and so I am going to -- I'm sorry, that's the expert

Case 3:20-cv-00296-DEP Document 20 Filed 07/23/21 Page 21 of 22

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